UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

STEPHEN SITES, on behalf of himself and all others similarly situated,

Plaintiff,

v. **Civil Action No. 2:20-cv-00704**

PORTFOLIO RECOVERY ASSOCIATES, LLC,

Defendant.

ORDER

The court is in receipt of the parties' joint filing regarding settlement and dismissal under Federal Rule of Civil Procedure 41(a)(1)(A)(ii), filed August 17, 2021. ECF No. 27.

The plaintiff in this action has asserted a claim individually and on behalf of others similarly situated for violation of the West Virginia Consumer Credit and Protection Act, W. Va. Code §§ 46A-2-127 and 46A-2-128(f). See ECF No. 1-2. In its order entered August 10, 2021, the court recognized that dismissal of the class claim as presented by the parties' stipulation of dismissal with prejudice under Federal Rule of Civil Procedure 41(a)(1)(A)(ii) (ECF No. 25) is not subject to the requirements of Rule 23(e) since no class had been certified

or proposed to be certified for the purposes of settlement. ECF No. 26, at 2. The court also recognized the holding in Shelton v. Pargo, Inc., 582 F.2d 1298, 1314 (4th Cir. 1978), in which the Fourth Circuit found that even though the particular formalities of Rule 23 are inapplicable where there is a voluntary pre-certification settlement, the court must consider potential collusion among the parties and prejudice to putative class members before approving the settlement. ECF No. 26, at 3. Ultimately, the court vacated the stipulation of dismissal with prejudice and directed the parties to provide "a detailed factual summary of the settlement and voluntar[]y dismissal with prejudice and justification for court approval thereof," noting that "[i]f the parties do not believe court approval is actually necessary, the filing should provide a legal basis for reaching such a conclusion." Id. at 4.

In their August 17, 2021 filing, the parties provide few details regarding the settlement. See ECF No. 27, at 3. The parties argue that voluntary dismissal is not subject to Rule 23 after its amendment in 2003 and that "oversight process [Shelton] describes is no longer required or authorized by the Rules." Id. at 5-6. They cite Withrow v. Enterprise Holdings, Inc., No. 3:09-1543, 2010 WL 3359686 (S.D. W. Va. Aug. 20, 2010), for the proposition that a Shelton review of the named

plaintiff's settlement is no longer necessary and posit that Milligan v. Actavis, No. 2:09-cv-00121, 2009 U.S. Dist. LEXIS 81663, at *2 (S.D. W. Va. Sept. 9, 2009), which required compliance with Shelton, was wrongly decided. Id. at 6-7. In the event the court requires more information, the parties "request that they be permitted to provide the terms of the confidential settlement agreement under seal, or for the Court's in camera review." Id. at 8.

The court has already found that Rule 23(e) is inapplicable in its August 10, 2021 order. ECF No. 26, at 2. But as the court in Milligan recognized, Shelton remains precedent in this circuit notwithstanding the clear inapplicability of Rule 23(e). 2009 U.S. Dist. LEXIS 81663, at *3 n. 1 ("Until the court of appeals revisits Pargo in light of the [2003] amendment [of Rule 23(e)], I believe I am obligated to apply that decision as binding precedent.").

The Withrow case cited by the parties does not alter this conclusion. The procedural background to the voluntary dismissal in Withrow was distinct:

> Soon [after the February 18, 2010 entry of the scheduling order], on March 16, 2010, counsel for Plaintiff called the Court and informed the Court that the parties had reached a tentative global settlement of the case. He explained there were jurisdictional issues with the case being in West Virginia so the parties intended to dismiss this action and refile it

> in Missouri. He invited the Court to contact him if the Court had any concerns about how the parties intended to proceed. As this case was in the very initial stages of litigation, a class was never certified, and the parties were refiling a class action petition in Missouri, the Court expressed no concern over the dismissal. Therefore, on April 28, 2010, the parties signed and filed a joint a Stipulation of Dismissal of Action without Prejudice pursuant to Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure, which required no action by this Court, and the case was terminated off the docket.

2010 WL 3359686 at *1. A dissatisfied party, Ms. Taylor, thereafter moved to set aside the voluntary dismissal, citing a failure to comply with Rule 23(e) and Shelton. Id. at *3-5.

The Withrow court considered the holding in Shelton concerning approval of pre-certification settlements of representative parties' individual claims in class actions and then explained why Shelton was "inapposite":

> In this case, the parties are not seeking to settle their individual claims to the detriment of the rest of the putative class. Rather, they voluntarily dismissed the entire case in order to bring the class action in Missouri so they could add additional defendants which this Court would not have had jurisdiction over if the matter proceeded here. Clearly, adding the alleged responsible parties as defendants in the new action is to the benefit of the putative class, and the opposite likely would be true if the action remained here and the additional defendants could not be made part of the action. In addition, although there may be some differences between CAFA and the settlement procedure in Missouri, a fair hearing already is scheduled in the Missouri action in which Ms. Taylor, or any other putative class member, may voice their objections. This Court has no reason to believe that the Missouri court will not make every effort to ensure that a fair and just

> settlement is reached with respect to the class members.

2010 WL 3359686, at *4. Although Withrow found Shelton to be inapplicable since the plaintiff in that case did not seek to settle individual claims to the detriment of the putative class, the court notes that Withrow, in effect, found the dismissal in that case to accord with Shelton inasmuch as no prejudice resulted from the dismissal and subsequent refiling of the action in Missouri. See id. at *4-5. Indeed, the court noted that even if Shelton were applicable, Ms. Taylor had "failed to demonstrate collusion by the parties or prejudice to the putative class members." Id. at *5.

Unlike the circumstances in Withrow, the court has little information to assess the possibility of collusion and potential prejudice to the putative class. However, several cases have interpreted Shelton to allow approval of relevant settlements on briefs without a full hearing. See Milligan, 2009 U.S. Dist. LEXIS 81663, at *3 n. 2; McCoy v. Erie Ins. Co., 204 F.R.D. 80, 83 n. 5 (S.D. W. Va. 2001); see also Shelton, 582 F.2d at 1315 (stating that a district court "should, after proper inquiry, determine whether the proposed settlement and dismissal are tainted by collusion or will prejudice absent putative members with a reasonable 'reliance' expectation of the

maintenance of the action for the protection of their interests.") (emphasis added).

Accordingly, it is ORDERED that the parties file a brief in support of approval of the settlement and voluntary dismissal of this action, together with a copy of the settlement agreement and any relevant supporting documents, within five days of the entry of this order. The court declines to preliminarily authorize the sealing of any such documents, and the parties are to comply with this District's protocols for sealing documents should they seek leave to seal them.

It is noted that any voluntary dismissal of this action shall be with prejudice only as between the named plaintiff and the defendant and shall be without prejudice as to the proposed class.

The Clerk is directed to transmit copies of this order to all counsel of record and to any unrepresented parties.

ENTER: August 20, 2021

John T. Copenhaver, Jr.
Senior United States District Judge